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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 782

THE TUSCALOOSA AND VICINITY DISTRICT COUNCIL OF TUSCALOOSA AND SELMA, ALABAMA; AND CARPENTERS AND MILLWRIGHTS LOCAL UNION NO. 1337, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on October 2, 1964.

OPINION BELOW

The opinion of the Court of Appeals is reported at 337 F. 2d 205 (*infra*, pp. 2a-9a). The original decision and order of the National Labor Relations Board are reported at 124 NLRB 544 (R. 161-182, 88-148[1]). Its supplemental decision and order are reported at 138 NLRB 76 (R. 214-215, 189-209).

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1964 (*infra*, p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a union commits an unfair labor practice when it denies referral to a job to employees for participating in a breach-of-contract and wildcat strike simply because the employer is indifferent to the unprotected character of the activity.

2. Whether investiture of employment control in a union in the operation of a referral system of employment is a valid basis for a finding that the hiring procedure is discriminatory.

3. Whether, in sole reliance upon a finding that employment at a construction project was based on a discriminatory hiring procedure, the Board may require the employer and the unions to refund to members of sister local unions working at the construction project the fees paid by them to the local union of the same international union in whose jurisdiction the construction project was located.

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[1] "R" refers to volume 1 of the record containing the pleadings and decisions in the proceedings before the Board. "J.A." refers to the Joint Appendix containing excerpts from the testimony and exhibits.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are set forth *infra,* pp. 1a-2a.

STATEMENT

On April 3, 1956 United Brotherhood of Carpenters and Joiners of America and H. K. Ferguson Company entered into a national agreement governing the employment terms to prevail in any locality in which Ferguson undertook a construction project (R. 90-91; J.A. 199-200). Ferguson agreed "to work the hours, pay the wages and abide by all lawful rules and regulations established or agreed upon by the United Brotherhood . . . and the recognized bargaining agency of the locality in which any work of our Company is being done . . ." (*ibid.*). The agreement stipulated that the identical terms applicable to local firms were to be extended to Ferguson: "No change is to be made in the hours and wages in any locality, and no conditions imposed other than are enforced on all Local firms" (*ibid.*). United Brotherhood agreed "to furnish competent Journeymen as requested . . ." (*ibid.*). A no-strike promise in the following terms was made: "no stoppage of work or any strike of its members, either collectively or individually, shall be entered into pending any dispute being investigated and all peaceable means taken to bring about a settlement" (*ibid.*).

Between January 1956 and November or December 1957, Ferguson was engaged in a construction project at Demopolis, Alabama (R. 89, 90). Construction millwrights for work at the project were primarily obtained through a referral system operated by peti-

tioner Tuscaloosa And Vicinity District Council, located at Tuscaloosa, Alabama, 60 miles from the project (R. 93-95). The District Council is composed of three Alabama local unions affiliated with United Brotherhood, petitioner Local 1337, at Tuscaloosa, Local 3200, at Demopolis, and a local at Selma. W. E. Goodman was business agent of the District Council. (J.A. 22, 23-24, 175-176, 193.)

The contractual wage for construction millwrights in the area, binding at the Demopolis project by virtue of the national agreement, was $2.57½ per hour (J.A. 35, 160, 178, 196). Dissatisfied with the wage scale, the millwrights working at the Demopolis project walked off the job in late November 1956 to protest it (R. 95). The walkout lasted several days; most of the millwrights then returned to work, after the District Council business agent and a United Brotherhood representative had promised that they would try to get the men a wage increase (*ibid.*). The business agent told the men, however, that "we had an agreement . . . as far as wages was concerned and there was not anything that the local union could do . . . other than just apply for more money through the company" (R. 95; J.A. 178). There "was a contract there and they were supposed to live up to it . . ." (J.A. 131).

The wage issue recurred a few days before Christmas 1956 (R. 95). Through their union steward, the millwrights notified Project Manager Paterson, Ferguson's top representative at the project, that they were going to walk off because they had not gotten a wage increase (*ibid.*). Paterson assembled the millwrights and prevailed on them to stay on the job for a week, informing them that during that time, while he could not personally grant them a wage increase, he

would intercede on their behalf with his superiors and with the owner who had contracted for the construction (R. 95-96; J.A. 159-160). He pointed out to them, however, that "they had an agreement of their own that stipulated their wage rate . . . " (R. 96; J.A. 160).

On Friday, December 28, 1956, no wage increase having been granted, every millwright but the union steward walked off the job (R. 96). While the steward remained, he had induced the stoppage, telling the men "to gather up our tools, that we were leaving the job until the pay difficulty was settled" (J.A. 115, 122).

Promptly upon learning of the walkout, Project Manager Paterson sent a wire to District Council Business Agent Goodman requesting that he send 50 millwrights to the job the following Monday, December 31 (R. 97). When he received the wire on Monday, Goodman tried to persuade the men to return to work on Wednesday morning, January 2, and issued referrals to them to report to work that day (*ibid.*). Goodman also called the United Brotherhood local union at Sheffield, Alabama, ascertained that 17 idle millwrights were available for work, and requested that they be sent to the project for work (R. 97-98).

The men who had walked out did not return to work on January 2 (R. 98). Millwrights from Sheffield, however, did begin to work at the project on that day (*ibid.*). When the Sheffield men had reported to the District Council the previous December 31, preparatory to reporting for work at the project, one of the strikers told them: "We quit a job down there trying to get more money and I wish you boys would help us get more money so we could have a good scale and not go down there and go to work" (R. 97-98; J.A. 70).

When told "Your business agent called ours", the striker replied, "I'm not telling you not to go and go to work; that's up to you all. I'm just asking you not to so we can get what we are after" (*ibid.*).

On January 2, when he learned that the strikers had not returned to work and that the incumbent union steward had tried to prevent the Sheffield men from going to work, Business Agent Goodman went to the Demopolis project and relieved the steward of his position (R. 99). At this time representatives of Ferguson and United Brotherhood negotiated a supplemental agreement increasing the wage scale at the project to $3 per hour (R. 92, 99). After the agreement was signed, a Ferguson representative told Business Agent Goodman that "didn't but seventeen men show up" for work and asked him if he "could get the men" (R. 100; J.A. 186). That day Goodman arranged to have the United Brotherhood local union at Chattanooga, Tennessee, furnish 30 millwrights for work at the Demopolis project (R. 100).

The next day, January 3, Business Agent Goodman cancelled all referrals for work at the Demopolis project which had been issued to the strikers (R. 100-101). In explaining the reason for cancellation to men complaining of the action, Business Agent Goodman stated to one striker "you are one of the fellows that walked out" (R. 107; J.A. 148); others were told "you didn't go back to work when I told you to go to work" (R. 101; J.A. 86); another striker was told "you quit up there, didn't you" (R. 108; J.A. 108); and, explaining his attitude towards another individual, Goodman stated that he "was involved in that walkout as much

as anybody else and he wanted him off the job" (R. 103; J.A. 53).

The Board found that because of their participation in the walkout eight men were permanently or temporarily denied referral to the Demopolis project with resulting loss of employment (R. 106-110). This action was found to be unlawfully discriminatory in that it was based on the employees' participation in the strike and refusal to discontinue it and was on that account "connected with their union membership or obligations" (R. 193). The unprotected character of the activity—a breach-of-contract and wildcat strike—was found to be irrelevant because the employer, but not the union, was indifferent to its unprotected attributes (R. 118).

The Board also found that the referral system of employment operated by the District Council was unlawful in that it "imposed closed-shop conditions of employment" (R. 192). This conclusion was based on two grounds: (1) The referral system "gave unfettered control to business Agent Goodman. . . . [R]eferral by Goodman was a prerequisite to hire" at the project (R. 192). (2) The character of the referral system was "particularly evidenced" by the denial of referral to participants in the walkout (R. 192-193).

Based on these findings, the Board entered a refund order, requiring that all employees hired at the project through the referral system who had not been members of petitioner Local 1337, even though they had been members of other local unions of United Brotherhood, shall "be reimbursed for the permit fees and/or 'dobies'

they paid in order to obtain employment" (R. 194, 196, 199, 201).

The Board's decision and order, as summarized above, was the second it had entered in this case. Its first decision and order antedated this Court's decisions in *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, *N.L.R.B.* v. *News Syndicate Co.*, 365 U.S. 695, and *Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651. In *Local 357, Teamsters* and *News Syndicate*, this Court held that investiture of employment control in a union could not invalidate the hiring procedure as discriminatory. In *Local 60, Carpenters*, this Court held that a finding of a discriminatory hiring procedure was not a valid basis for an order requiring the refund of union dues and fees to union members. As the Board's first decision in this case was based on views rejected by this Court's later decisions, the Board reconsidered its first decision and issued a second. In its second decision, despite *Local 357, Teamsters* and *News Syndicate*, the Board continued to hold that the referral system was unlawful in reliance on "unfettered control" in the union and referral as a "prerequisite to hire" (R. 192). And, despite *Local 60, Carpenters*, in which refund of "nonmembership dues . . . and work permit fees" was disallowed (365 U.S. at 652), the Board in its second decision required reimbursement of "permit fees and/or 'dobies'" (R. 194), the identical refund disapproved by this Court.

The decision of the Court of Appeals sustained the decision and order of the Board in full (*infra*, pp. 2a-9a).

REASONS FOR GRANTING THE WRIT

This petition presents three questions. The first question requires plenary consideration. It necessitates determination of the fundamental issue whether a union, no less than an employer, can deny employment to an employee because he engages in the unprotected activity of participating in a breach-of-contract and wildcat strike. Administration of day-to-day labor relations is of course as much a function of the union as of the employer. The Board nevertheless holds the position, in this and other cases, that in acting adversely to an employee a union has less leeway than an employer to take the identical action for the identical reasons. Sometimes the courts approve the Board's dichotomy; sometimes they disapprove. It is important to all—unions, employers, and employees—to know authoritatively whether the duty exacted of the union enforceable by the Board is in similar situations the same as or different from that of the employer.

The second and third questions presented by the petition challenge holdings which should be summarily reversed because in conflict with and governed by controlling decisions of this Court. In contradiction of *Local 357, Teamsters* and *News Syndicate,* the Board holds, with approval of the court below, that a hiring procedure can be found unlawful in reliance upon investiture of employment control in a union. In contradiction of *Local 60, Carpenters,* the Board holds, with approval of the court below, that fees should be refunded that were paid by members of sister local unions to another local union of the same international union in whose jurisdiction the member worked. Regard for the administration of justice commands ad-

herence to this Court's decisions and merits summary reversal when unheeded.

I

The first question presented is focussed by the following summary of facts contained in the Board's brief in the court below which we accept (pp. 19-20):[2]

> . . . Business Agent Goodman's refusal to issue referrals to the "old" men so they could return to work was obviously the result of his anger over their strike and their failure to terminate it when he had expected them to. The millwrights walked off the job on November 23 because of dissatisfaction with their wages and returned to work only on the promise of General Manager Ferguson that he would try to get a raise for them. No increase having been granted, the millwrights walked off again on Friday, December 28. The company immediately asked Goodman to supply 50 millwrights, and on Monday, December 31, Goodman tried to persuade the strikers to return to work. He also issued a number of referrals so that they could do so. The strikers did not go back to work, however, on January 2, the next workday. Rather, they stayed out on strike. As a result, the following day, January 3, Goodman called and told the personnel clerk that he had revoked all the referrals issued to the former millwrights and that they should not be permitted to go to work. Later that day, Goodman frankly admitted to a group of millwrights that he had revoked their referrals because "you didn't go back to work when I told you to go to work" (J.A. 86). He later supplemented this explanation with statements indicating that it was extremely doubtful if he would ever issue job referrals to the strikers

[2] Nine copies of the Board's brief have beeen lodged with the Clerk of this Court.

who had "crossed" him by failing to return to work when he had told them to (J.A. 141).

The Board's own summary discloses with crystal clarity that the strikers were denied referral because they had participated in a breach-of-contract work stoppage called without the authority of the representative and continued despite the representative's order to return to work. The Board found on these facts that the denial of referral to the strikers was unlawfully discriminatory because based on "reasons connected with their union membership or obligations" (R. 193). But the "union membership or obligations" to which fealty was demanded was the duty to refrain from breach-of-contract strike activity called and continued without the authority of the bargaining representative. The Board thus extends statutory sanction to unprotected activity. The conduct is unprotected on two distinct grounds: (1) the strike was called in violation of an express no-strike commitment and in repudiation of the contractual wage;[3] (2) the strike was wildcat activity because undertaken without the authority of the representative and continued in disregard of his instructions to return to work.[4] And it hardly needs to be added that unprotected activity is a valid basis for termination of employment.[5]

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[3] *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332, 344; *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, 80; *Confectionary & Tobacco Drivers, Local 805* v. *N.L.R.B.*, 312 F. 2d 108, 112 (C.A. 2); *W.L. Mead, Inc.*, 113 NLRB 1040.

[4] *Simmons, Inc.* v. *N.L.R.B.*, 315 F. 2d 143 (C.A. 1); *N.L.R.B.* v. *Sunbeam Lighting Co.*, 318 F. 2d 661 (C.A. 7); *Harnischfeger Corp.* v. *N.L.R.B.*, 207 F. 2d 575 (C.A. 7); *N.L.R.B.* v. *Draper Corp.*, 145 F. 2d 199 (C.A. 4).

[5] *N.L.R.B.* v. *Local Union No. 1229, I.B.E.W.*, 346 U.S. 464, 479, n. 13.

The sole reason advanced by the Board for disregard of the fact that the men "had gone on strike in contravention of the no-strike clause of the contract" was that the employer was indifferent to the breach (R. 118). This is beside the point. The bargaining representative has an independent and coequal interest in securing observance of agreements and maintaining disciplined recourse to concerted activity. Breach of a no-strike commitment exposes the union to liability.[6] More fundamentally, collective bargaining would have little meaning if agreements reached were not to be responsibly observed, and the authority of the bargaining representative would have little worth if the men were free to strike to change the agreement in disregard of the representative. A union therefore has a vital interest in preventing and deterring the disruption caused by breach-of-contract and wildcat activity. Those who engage in such activity may lawfully lose their employment at the behest of the union no less than by the independent action of the employer.[7]

The important, recurring, and unsettled question presented on this branch of the case is, therefore, whether under the National Labor Relations Act a union may take action vis-a-vis the employment status of an employee for the identical reasons which would be allowable to an employer acting alone. Writing for the Court of Appeals for the Second Circuit, Judge Paul R. Hays has stated emphatically yes (*N. L. R. B.* v. *Local 294, Teamsters*, 317 F. 2d 746, 749, 751 (C.A. 2)):

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[6] *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95.

[7] *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 676; *N.L.R.B.* v. *Furriers Joint Council*, 224 F. 2d 78 (C.A. 2); *N.L.R.B.* v. *Local 294, Teamsters*, 317 F. 2d 746 (C.A. 2).

> . . . a union does not violate Section 8(b)(2) unless the discrimination which the union seeks would constitute a violation of Section 8(a)(3) if the employer acted without union suggestion or compulsion.
>
> * * *
>
> The conclusion of the Board that an employer commits an unfair labor practice if he changes an employee's conditions of employment at the instance of the union, is not only contrary to the letter and spirit of the Act and to the precedents, but is based on a view of labor-management policy which is certain to have untoward consequences. There are countless situations in which the concept of collective action demands that unions have the power to influence the employer to make changes in the job status of individual employees. . . . Not only is the Board without authority to pass upon the wisdom or the desirability of a union's actions as long as those actions are not forbidden by the Act, but the principle applied by the Board would be equally applicable to actions which are clearly beneficial to the majority of employees.

A sharply divided Board, by a 3 to 2 split, emphatically disagrees. *Miranda Fuel Co.*, 140 NLRB 181. According to it, "a labor organization as a statutory bargaining representative is *not* the same entity under the statute as an employer; for labor organizations, because they do represent employees, have statutory obligations to employees which employers do not." *Id.* at 185. And so, a union may not take action against an employee for "irrelevant, invidious, or unfair" reasons, nor may the employer do so at the behest of the union, even though the employer is free independently of the union to take just that action for just those reasons. *Id.* at 185-186. On judicial review, a divided Court of Appeals denied enforcement in *Miranda*, but

the Board's position provoked three separate opinions by the sitting judges. *N.L.R.B.* v. *Miranda Fuel Co.*, 326 F. 2d 172 (C.A. 2). And the Board by the same narrow margin continues to adhere to its stand.[8]

The dichotomy which the Board has evolved between employers and unions in the duty enforceable by the Board which each owes to employees is sharply presented in this case. There cannot be the least doubt that the employer here would have been legally free to discharge or discipline the strikers because of their breach-of-contract and wildcat activity. Yet, simply because the employer was indifferent to the unprotected activity—presumably because its need for men on the job was its paramount concern—the union was disallowed to assert its own independent interest in assuring responsible regard for contract observance. Everyday administration of labor relations cannot tolerate this duality. Intercession by this Court is required to settle the ground rules.

II

The Board found that the referral system "imposed closed-shop employment conditions" in that its operation was under the "unfettered control" of Business Agent Goodman and dispatch by him "was a prerequisite to hire" at the project (R. 192). In agreement the court below stated that (*infra*, p. 7a):

> There is no question that the hiring practices in the Demopolis-Tuscaloosa area as adhered to by both the company and the respondent unions

[8] *Local 1367, I.L.A.*, 148 NLRB No. 44, 57 LRRM 1083; *Independent Metal Workers Union, Local No. 1*, 147 NLRB No. 166, 56 LRRM 1289.

> created a closed shop condition on the Demopolis project. This is true since the company not only hired exclusively through the hiring hall maintained by Goodman, but it granted Goodman absolute control over the selection of millwrights for this project, and it refused, without any questions asked, to employ millwrights unless they could secure referrals from Goodman.

This basis of decision is in flat conflict with the decisions of this Court in *Local 357, Teamsters* v. *N. L. R. B.*, 365 U.S. 667, and *N.L.R.B.* v. *News Syndicate Co.*, 365 U.S. 695. Until rejected by this Court, the Board had taken the position that it was unlawful for a union to operate an exclusive hiring hall, an exclusive referral system, or any other hiring arrangement in which the employer placed employment in absolute union control, unless the arrangement was based on an agreement incorporating three requirements formulated by the Board: (1) selection of applicants for referral to jobs shall be on a nondiscriminatory basis; (2) the employer retains the right to reject any job applicant referred by the union; and (3) the parties to the agreement post notices of all the provisions relating to the functioning of the hiring arrangement. As quoted by this Court in *Local 357, Teamsters,* in the absence of these protective provisions, the gist of the offense as conceived by the Board was that "The Employers . . . have surrendered all hiring authority to the Union and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so" (365 U.S. at 671). As summarized by this Court in *News Syndicate,* the Board "held that vesting control over employment in union foremen was a delegation of exclusive control over

hiring to the union without the requisite safeguards prescribed by the Board. . ." (365 U.S. at 698).

In *Local 357, Teamsters* and *News Syndicate* this Court rejected the view that investiture of exclusive employment control in a union of itself suffices to illegalize the hiring arrangement. Yet the view rejected by this Court continues as the basis of decision in this case. Despite ostensible reconsideration by the Board of its first decision in this case in the light of this Court's supervening opinions in *Local 357, Teamsters* and *News Syndicate* (R. 192), the Board in its second decision reached the identical result using the identical epithets. It sounded the same call of "unfettered control" and "referral" as "a prerequisite to hire" (R. 192). So did the court below in intoning that the employer "hired exclusively through the hiring hall," granted the Union "absolute control" over the selection of employees, and "refused, without any questions asked, to employ" personnel "unless they could secure referrals . . ." (*infra*, p. 7a). This Court's decisions settled the ground rules the other way in holding that union control over hiring was not illegal. Justice cannot be administered if the rules settled by this Court are disregarded, and cannot be evenhandedly administered if heed is given to the anticipated plea that an occasional aberration is tolerable.

Departure from this Court's decisions is aggravated by the Board's statement that illegal operation of the hiring hall is "particularly evidenced" by denial of referral to the participants in the breach-of-contract and wildcat strike (R. 192-193). All that is "particularly evidenced" is that the union called a halt to unprotected activity. The Board thus compounds two rights to create a wrong. Union operation of an ex-

clusive referral system is a right. So too is denial of employment to participants in unprotected activity. Totalling rights cannot add up to unlawful conduct. The judgment as it relates to this branch of the petition should therefore be summarily reversed on the authority of this Court's decisions in *Local 357, Teamsters* and *News Syndicate.*

III

In its first decision in this case, based on its finding that employment at the Demopolis project was governed by a discriminatory hiring procedure, the Board ordered that the millwrights employed at the project be refunded "the dues, initiation fees, assessments, permit fees and/or 'dobies' " paid by them (R. 126, 163, 166, 168-169, 170-171). Thereafter, in *Local 60, Carpenters* v. *N L. R. B.,* 365 U.S. 651, this Court invalidated the blanket refund remedy, typified by the reimbursement ordered in this case, as "punitive and beyond the power of the Board" (*id.* at 655).[9] In its second decision in this case, upon reconsideration in the light of *Local 60, Carpenters,* the Board modified the refund order but only to the extent of excluding from its terms members of Local 1337 (R. 194). As to members of sister local unions of United Brotherhood employed at the project, the Board directed that they "be reimbursed for the permit fees and/or 'dobies' they paid in order to obtain employment" (R. 194). Thus, the Board requires a refund of "permit fees and/or 'dobies' " to the millwrights who came from and are members of the local unions at Sheffield, Alabama (*supra,* p. 5), Chattanooga, Tennessee (*supra,* p. 6),

[9] Accord, *Local 357 Teamsters* v. *N.L.R.B.,* 356 U.S. 667, 670-671; *N.L.R.B.* v. *News Syndicate Co.,* 365 U.S. 695, 699.

Macon, Georgia (J.A. 97-98), and Mobile, Alabama (J.A. 113-114, 121, 122).

The order as modified, no less than the original order, is in flat conflict with this Court's decision in *Local 60, Carpenters.* It is indeed the identical order that this Court invalidated. Thus, the order set aside by this Court required the refund of "dues, *nonmembership dues,* assessments, and *work permit fees* . . ." (365 U.S. at 652, emphasis supplied). The italicized fees pertain only to members of local unions who work at a project located outside the jurisdiction of their home local or the district council of which the home local is a part. This Court noted this fact explicitly when it described the fees payable by such members: "A member who is working within the jurisdiction of a district council who has not transferred his membership to a local union of the council pays for a working permit that is not less than 75 cents a month nor more than the local monthly dues" (*id.* at 652, n. 1). The record clearly disclosed the situation to which such fees were directed (Record, *Carpenters' Local 60,* No. 68, October Term, 1960, 47-48);

> Q. Now, based upon your experience as a member of the Carpenters' union in the Indianapolis area, will you state what the practice is, if any, with regard to men from other local[s] coming into the area?
>
> * * *
>
> A. Well, they have to get a permit in order to come to work. That is the practice in all areas, not just in Indianapolis.
>
> * * *
>
> Q. Will you state for the record whether or not there is any other way that men can go to work?

A. Why they can clear in through Indianapolis.

Q. What do you mean by clearing in?

A. Well, that's a process where you check out of one local and into another in another area.

Q. I see. Will you state for the record what you mean by a permit?

* * *

A. (Continued) A permit. You continue to hold your status in your home local wherever that might be.

* * *

Trial Examiner: Now, isn't this it, . . . that a man who is a member of a local outside of the jurisdiction of a local where he is going to work, he goes to that local and he asks for a permit to work; he remains a member of the local in which he holds his membership?

The Witness: Yes.

Trial Examiner: He works in this new district where he doesn't belong?

The Witness: Yes.

Trial Examiner: He pays for the services that this district gives him when he gets the permit card?

The Witness: That's right.

This procedure is prescribed by the constitution of United Brotherhood; a member who leaves the jurisdiction of his home local to work elsewhere may either transfer his membership to the sister local union in the jurisdiction where the work is secured, or he may retain his membership in his home local and obtain a working permit from the sister local union in the jurisdiction of the work, at his option (*id.* at 102-104).

This precise situation obtains as well in this case. The identical provision of the constitution of the United Brotherhood governs, providing that a member

working outside the jurisdiction of his home local may either transfer his membership to, or obtain a working permit from, the sister local union having jurisdiction over the work (G. C. ex. 12, § 46, pp. 39-41). To obtain a working permit, the identical constitutional requirement prevails, namely, that the "member shall pay for such Working Permit a charge of not less than Seventy-five Cents (75¢) per month, nor more than the monthly dues of the Local Union or District Council . . ." (G.C. Ex. 12, § 46C, p. 40). Correspondent to this provision of the constitution of United Brotherhood, the by-laws of the District Council provide that any member coming into the District who desires to retain his membership in his home local shall pay "foreign dues" in a sum equal to one month's dues plus any assessments in effect (G.C. ex. 8, § 2(2), p. 5).[10] And this was the procedure followed by members of sister locals who came to work at the Demopolis project (J.A. 154-155).

There is thus complete identity in the situation in this case and in *Local 60, Carpenters.* In both, members working outside the jurisdiction of their home local paid fees to the sister local having jurisdiction at the situs of the work. This movement of members between local unions, either by a transfer of member-

---

[10] While the District Council by-laws state that the monthly dues are $3.25 per month (G.C ex. 8, § 1(9), p. 4), the record indicates that the actual payment was $4 per month (J.A. 98, 103), thus showing either an increase in dues not yet reflected in the printed by-laws or a currently effective assessment. The statement in the intermediate report that one member paid "foreign dues of $4 per week" is mistaken (R. 123). While there is testimony to that effect (J.A. 114), the same witness later described the fee as "a month's dues" (J.A. 118), which is consistent with the constitution of United Brotherhood, the by-laws of the District Council, and the other testimony of record.

ship or by obtaining a working permit, reflects the mobility of labor and the floating nature of jobs in the building and construction industry. "In the latter the contractor who frequently is a stranger to the area where the work is done requires a 'central source' for his employment needs; and a man looking for a job finds in the hiring hall 'at least a minimum guarantee of continued employment.'" *Local 357, Teamsters* v. *N. L. R. B.*, 365 U.S. 667, 672-673. Members moving between local unions change pews but not their church. In setting aside the refund order in *Local 60, Carpenters*, this Court stated: "As Judge Pope said in *Morrison-Knudsen Co.* v. *Labor Board*, 276 F. 2d 63, 76, 'reimbursing a lot of old-time union men' by refunding their dues is not a remedial measure in the competence of the Board to impose. . ." (365 U.S. at 655-656). And what made them "old-time union men," as Judge Pope observed, is the likelihood that they had been "members of the union *or some of its branches* for many years" (276 F. 2d at 74, emphasis supplied). Finally, the Board had ordered the refund of weekly work permit fees paid by members of sister locals in *Morrison-Knudsen Co., Inc.*, 123 NLRB 12, 14, 23; the Court of Appeals for the Second Circuit set aside the order as "unfair" "even as applied to the members of other locals. . .", *Morrison-Knudsen Co., Inc.* v. *N. L. R. B.*, 275 F. 2d 914, 918; and, two weeks after its decision in *Local 60, Carpenters*, this Court denied the Board's petition for a writ of certiorari, the Court having obviously deferred disposition of the petition to await the outcome of *Local 60, Carpenters*. *N. L. R. B.* v. *Morrison-Knudsen Co., Inc.*, 366 U.S. 909.

In sum, in this case, despite ostensible modification to conform with *Local 60, Carpenters*, the order as

modified is a replica of the order set aside in *Local 60, Carpenters,* and the judgment enforcing it should therefore be summarily reversed on the authority of that decision.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted. Question 1, pertaining to denial of referral because of participation in breach-of-contract and wildcat strike activity, should be set down for plenary consideration. The judgment as it pertains to question 2—the finding of a discriminatory hiring procedure in reliance upon investiture of employment control in the union—should be summarily reversed on the authority of *Local 357, Teamsters* v. *N. L. R. B.*, 365 U.S. 667, and *N. L. R. B.* v. *News Syndicate Co.*, 365 U.S. 695. The judgment as it pertains to question 3—the refund of fees paid by members of sister locals—should be summarily reversed on the authority of *Local 60, Carpenters* v. *N. L. R. B.*, 365 U.S. 651.

Respectfully submitted,

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APPENDIX

APPENDIX A

Pertinent Provisions of the National Labor Relations Act, As Amended (61 Stat. 136, 29 U.S.C. Secs. 151, et seq.)

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *

* * * * *

[SEC. 10(c)] . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

APPENDIX B

Opinion

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20281

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

versus

THE H. K. FERGUSON COMPANY; THE TUSCALOOSA AND VICINITY DISTRICT COUNCIL OF TUSCALOOSA AND SELMA, ALABAMA; AND CARPENTERS AND MILLWRIGHTS LOCAL UNION NO. 1337, *Respondents.*

Petition for Enforcement of an Order of the National Labor Relations Board.

(October 2, 1964.)

Before BROWN and WISDOM, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge: This is a petition filed by the National Labor Relations Board for the enforcement of an order issued against respondents following proceedings under § 10(e) of the Act.[1]

---

[1] 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 et seq.

In the proceedings that culminated in the order the Board now seeks to have this Court enforce, it was found by the Board that the hiring practices maintained by the H. K. Ferguson Company, the District Council, and Local 1337, in the enforcement and administration of a master agreement, were in violation of the Act in that, as a result of absolute control over the hiring of millwrights that had been given to business agent Goodman, these practices resulted in the establishment of closed shop conditions at the Demopolis, Alabama, project where the company, an Ohio corporation, was engaging in construction and related work and was building a paper mill for the Gulf States Paper Corporation. The Board concluded that by maintaining and enforcing these unlawful practices the District Council and Local Union 1337 violated § 8(b)(1)(A) and 8(b)(2), and the Ferguson Company violated § 8(a)(1) and (3) of the Act.[2]

---

[2] The pertinent provisions of the statute are:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;"

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . ."

* * *

"(b) It shall be an unfair labor practice for a labor organiation or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

The Board also found that eight named employees were discriminatorily denied employment in the implementation of the closed shop practices that were found to exist, and further, that by agent Goodman's discriminatory denial of referrals and the company's acquiescence in Goodman's actions, the District Council and Local 1337 violated § 8(b)(1)(A) and 8(b)(2) of the Act, and the Ferguson Company violated § 8(a)(1) and (3) of the Act.

The Board's order requires the company to cease and desist from maintaining, enforcing or giving effect to any arrangement or practice with the District Council or Local 1337, or any other labor organization which required membership as a condition of employment; from encouraging membership in Local 1337 or any other labor organization by discriminating with respect to hiring or tenure or any other term or condition of employment, and from, in any other manner, interfering with employees in the exercise of their rights as guaranteed in § 7 of the Act. With respect to the District Council and Local 1337, the Board's order requires that each cease and desist from maintaining, enforcing or giving effect to any arrangement or practice with the company or any other employer which requires membership in it or any of its affiliated organizations as a condition of referral for employment; from causing or attempting to cause the company or any other employer to discriminate against the employees or applicants for employment in violation of the Act and from, in any other manner, restraining or coercing employees or applicants for employment in the exercise of rights guaranteed in § 7 of the Act. The Board's order also requires each of the respondents, jointly and severally, to reimburse the eight named employees for any loss they may have suffered as a result of the discrimination against them and to reimburse all nonmember millwrights and millwright apprentices who worked at the Demopolis project for monies illegally extracted from them by way of fees or "dobies," required as a condition to issuing referrals to the Demo-

polis job to applicants who did not have membership in the Demopolis local or Local 1337 in Tuscaloosa, Alabama.

The questions presented to this Court are:

(1) Whether substantial evidence on the record as a whole supports the finding of the Board that the company, in violation of § 8(a)(1) and (3) of the Act, and the District Council and Local Union 1337, in violation of § 8(b)(1)(a) and 8(b)(2), maintained and enforced hiring practices at the Demopolis, Alabama, project which created closed shop conditions.

(2) Whether substantial evidence on the record as a whole supports the finding of the Board that the company, in violation of § 8(a)(1) and (3) of the Act, discriminatorily refused to employ, and the District Council and Local Union 1337, in violation of § 8(b)(1)(A) and 8(b)(2), discriminatorily refused to refer for employment certain named employees in the implementation of unlawful closed shop practices and for reasons connected with their union membership.

(3) Whether the Board's order that is sought to be enforced is otherwise valid and proper.

The facts as reflected by our study of the record in this case are, generally, as follows: About November 23, 1956, the millwrights on the Demopolis, Alabama, project became dissatisfied with their wages and walked off the job. Prior to this the Ferguson Company and the respondent unions had entered into a master contract that provided that the United Brotherhood of Carpenters and Joiners, the parent body of the District Council and Local 1337, would furnish competent journeymen as requested. The contract was administered for the Demopolis project by William E. Goodman, the business agent for the District Council. Local 3200 in Demopolis, Alabama, a local in Selma, Alabama, and Local 1337 were under the jurisdiction of the District Council. Goodman maintained a hiring hall in Tuscaloosa,

Alabama. The company's superintendent of millwrights was instructed to call Goodman when he needed employees. The 192 millwrights employed at various times on the Demopolis project were secured through the Tuscaloosa hiring hall. After a promise by the company's General Manager that an attempt would be made to secure an increase for them if they would return to work, the millwrights returned to work; however, on or about December 21, no increase having been given, they threatened to walk out again, but were persuaded by the General Manager to wait a short while during which he promised to attempt again to secure the increase. On Friday, December 28, no raise in wages having been given, every millwright but the union steward again walked off the job. On December 29 the company's General Manager sent a telegram to business agent Goodman requesting that he secure 50 millwrights immediately. Upon receipt of this wire Goodman attempted to persuade the millwrights who had walked off the job to return, and issued a number of referrals to certain of them. On January 2, 1957, a few of the strikers who been issued referrals appeared at the project gate, but due to some mixup they left without returning to work. Later on January 2 nine millwrights who had been secured by Goodman arrived from a Sheffield, Alabama, local, presented their referrals and went to work. On the same day the Ferguson Company and an international representative of the Carpenters Union negotiated a supplemental agreement increasing the wages for the duration of the project. Also on that date the company officials requested more millwrights of Goodman, and he transmitted this request to another local union in Chattanooga, Tennessee. During this entire period the company made it plain to Goodman that the striking millwrights were acceptable to them if Goodman would issue them their referrals. After making arrangements with the Sheffield local and the Chattanooga local for 47 millwrights, on January 3, 1957, Goodman revoked the referrals issued to the former millwrights

and so advised his representative at the Demopolis, Alabama, project.

There is no question that the hiring practices in the Demopolis-Tuscaloosa area as adhered to by both the company and the respondent unions created a closed shop condition on the Demopolis project. This is true since the company not only hired exclusively through the hiring hall maintained by Goodman, but it granted Goodman absolute control over the selection of millwrights for this project, and it refused, without any questions asked, to employ millwrights unless they could secure referrals from Goodman. By such conduct the Ferguson Company made Goodman its agent in determining an individual's eligibility for employment and by doing so became liable for any unfair practices committed by Goodman in connection with his hiring or refusing to hire. As the Second Circuit stated in *Morrison-Knudsen Company* v. *N.L.R.B.*, 275 F. 2d 914, 917, cert. denied 366 U.S. 909:

> "[A]n employer may not avoid liability for violations of the Act by the hiring hall when he has turned over to it the task of supplying the men to be employed. The Local acted as agent for the petitioners in selecting the men to be hired. Its discriminatory acts, which unlawfully encourage membership in Local 545, are properly chargeable to the agent's principal as discriminatory acts by it."

Thus the evidence that was before the Board supports the Board's finding that the agreement between the Ferguson Company and the respondent unions with reference to securing employees through Goodman exclusively, as the agent for the parties, created a closed shop condition in the Demopolis-Tuscaloosa area. Such conduct, without any question, encourages membership in the local unions and, therefore, constitutes violations of § 8(b)(1)(A) and 8(b)(2) of the Act by the unions and § 8(a)(3) and (1) by the company. *N.L.R.B.* v. *George D. Auchter*

Co., 209 F. 2d 273 (5th Cir.); *N.L.R.B.* v. *Local Union No. 85, Sheet Metal Wkrs.' Int. Ass'n.*, 274 F. 2d 344 (5th Cir.), cert. denied 366 U.S. 908; *N.L.R.B.* v. *Local Union No. 450, etc.*, 281 F. 2d 313 (5th Cir.), cert. denied 366 U.S. 909.

The eight named employees that the Board found to have been discriminated against in this proceeding were among the striking millwrights. The Board found in this connection, and the record submitted to this Court amply supports that finding, that as a result of the employees' failure to obey Goodman, their referrals were revoked and they were denied the right to return to work for the company. These employees were, therefore, the victims of Goodman's discriminatory employment policy, which policy was acquiesced in by the Ferguson Company. The obligations which Goodman required the former employees to meet before he would issue them another referral, as these obligations were found to exist by the Board, constituted unlawful requirements relating to union membership, and the respondent unions by interposing them between the employees and their jobs violated § 8(b)(1)(A) and 8(b)(2) of the Act, and the company by condoning or acquiescing in such conduct violated § 8(a)(1) and (3) of the Act. *N.L.R.B.* v. *George D. Auchter Co., supra; N.L.R.B.* v. *Local Union No. 85, Sheet Metal Wkrs.' Int. Ass'n., supra; N.L.R.B.* v. *Local 1423, etc.*, 238 F. 2d 832 (5th Cir.); *N.L.R.B.* v. *Millwrights' Local 2232, District Council, etc.* (5th Cir.), 277 F. 2d 217, cert. denied 366 U.S. 908.

The Board did not find, and this Court does not hold, that the contract between the company and the union and the practice followed in using Goodman as its exclusive hiring agent made the transaction illegal per se. As stated by the Supreme Court in *Local 357, International Brotherhood of Teamsters, etc.* v. *N.L.R.B.*, 365 U.S. 667, such contracts are not illegal upon their face. However, under the circumstances in this case the factual findings by the Board, which findings, when the record is considered as a

whole, are supported by substantial evidence, clearly reflect discrimination on the part of the company in refusing to employ and discrimination on the part of the unions in refusing to refer for employment. This discrimination by the company and the unions reflects the "true purpose" or "real motive" that makes the arrangement illegal. *Local 357, International Brotherhood of Teamsters, etc.* v. *N.L.R.B., supra.*

The finding by the Board that the respondent unions had unlawfully exacted permit fees or "dobies" from nonmembers as a condition to referral by Goodman is amply supported by the record. The Board in directing reimbursement of these fees for remedial purposes properly acted within its discretionary authority. *Local 60, United Brotherhood of Carpenters* v. *N.L.R.B.*, 365 U.S. 651.

The Board's order will be ENFORCED.

APPENDIX C

Judgment

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an order of the National Labor Relations Board made on August 10, 1962 in the proceedings known upon the records of the Board as Case Nos. 15-CA-1025 and 15-CB-195, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Order of the Board be, and the same is hereby, enforced.

"Per JOHNSON, District Judge"

10/2/64

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JOHN F. DAVIS, CLERK

No. 782

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE TUSCALOOSA AND VICINITY DISTRICT COUNCIL OF TUSCALOOSA AND SELMA, ALABAMA; AND CARPENTERS AND MILLWRIGHTS LOCAL UNION NO. 1337, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 2a–9a) is reported at 337 F. 2d 205. The Board's original decision and order (R. 161–172, 88–128)[1] are reported at 124 NLRB 544. Its supplemental decision and order (R. 214–215, 189–202) are reported at 138 NLRB 76.

[1] References designated "R." are to the Transcript of Record printed for the court of appeals, and references designated "J.A." are to the portions of the testimony and exhibits printed as a joint appendix. Copies of both of these documents have been filed with the petition.

JURISDICTION

The judgment of the court of appeals (Pet. 9a) was entered on October 2, 1964. The petition for a writ of certiorari was filed on December 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supported the Board's findings that petitioners maintained closed-shop hiring practices at a construction project and refused to refer eight persons for employment because they had not complied with union membership obligations.

2. Whether the Board properly required petitioners to reimburse nonmembers of Local 1337 for the permit fees which they had to pay in order to obtain employment under the hiring arrangement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 1a–2a of the petition.

STATEMENT

From January 1956 to November or December 1957, the H. K. Ferguson Company ("the Company") performed construction services for the Gulf States Paper Corporation at Demopolis, Alabama (R. 89). During this period the Company had a master contract with the United Brotherhood of Carpenters and Joiners, the parent body of petitioners here, which provided

that the Brotherhood would furnish "competent Journeymen as requested" (R. 91; J.A. 199–200). This contract was administered on the Demopolis project by William E. Goodman, business agent for petitioner District Council,[2] whose office was in Tuscaloosa, Alabama, some 60 miles away (R. 93; J.A. 175–176). The Company's superintendent of millwrights followed a standard practice of calling Goodman when he needed men. Goodman, in turn, selected the men and issued referrals. These referrals were shown to the Company's personnel department, which then prepared the necessary employment documents. The superintendent accepted all the millwrights selected by Goodman (R. 93–94; J.A. 46–48). No millwright, with very few exceptions,[3] was allowed to work without a referral from Goodman, even if he had performed satisfactory work on the project in the past (R. 100–101, 103, 104, 105; J.A. 27–30, 32, 52–57, 70–72, 74). The practice was described by the project manager to a group of millwrights seeking work as follows: "I want you down here and he [Goodman] won't give you any referrals and I can't hire you unless he does" (R. 104–105; J.A. 32). In order to secure a referral from Goodman, a millwright had to be or become a member of one of the locals under the District Council's jurisdiction. If he was a member of an outside local, he could pay a working fee, called a "dobie" (J.A. 96–

[2] Petitioner Local 1337 is under the District Council's jurisdiction.

[3] During the Demopolis project the Company hired 192 millwrights. All but 3 were definitely secured through Goodman (R. 94; J.A. 28, 189–192).

98, 113–114, 125, 132).[4] The local's dues were $4 a month, while the dobie was $4 a week (R. 123; J.A. 98, 114).

About November 23, 1957, the millwrights on the Demopolis project became dissatisfied with their wage and walked off the job (R. 95; J.A. 13–14, 64–66, 89, 126–127). In return for the promise of the project manager that he would try to get an increase for them, they returned to work (R. 95; J.A. 66, 156). When no increase was granted by December 21, the millwrights threatened to walk out again, but they were persuaded to wait for another week (R. 95–96; J.A. 14–16, 67–69, 104, 114–115, 137, 158–161, 165, 147–148). As the end of the week approached, it was rumored that no increase would be granted (R. 96–97; J.A. 147–148). On Friday, December 28, every millwright but the union steward walked off the job (R. 96; J.A. 14–16, 69, 107, 148). On Saturday, December 29, the project manager sent a telegram to Goodman requesting that he supply the project with 50 millwrights immediately (R. 97; J.A. 161). Goodman received this request on Monday, December 31. He then attempted to persuade the strikers to return and issued a number of referrals for them. On ascertaining by phone that the local at Sheffield, Alabama, had 17 men available, he requested that they be sent to the project (R. 97–99; J.A. 70–71, 179–182).

[4] A member of an outside Brotherhood Local could change his membership from his home local to a local belonging to petitioner District Council (called "clearing") and pay dues to the latter, or he could continue his membership in his home local and pay the "dobie" to the District Council. In the instant case some of the men changed locals (J.A. 103, 136–137, 117–118, 139–140, 144–145).

On Wednesday, January 2, the next working day, a few of the strikers who had been issued referrals appeared at the project gate. The union steward met them and announced that the millwright superintendent was absent, whereupon they left (R. 98; J.A. 19–20, 24–25, 80–81). Later in the morning, nine millwrights from Sheffield arrived at the gate, presented referrals issued them by Goodman, and went to work (R. 98–99; J.A. 27, 205–211, 82). During the course of the day, Goodman replaced the union steward with one of the men from Sheffield, and the steward quit in protest (R. 99; J.A. 20–21).

At noon on January 2, the project manager, Goodman, and a representative of the Brotherhood met and negotiated a supplementary agreement which increased the hourly wage rate for the millwrights (R. 99; J.A. 162–163, 201). At the end of the conference, a Company official complained to Goodman that there were no former millwrights and very few new ones from Sheffield on the job (R. 99–100; J.A. 186). Goodman thereupon directed his secretary to telephone the Chattanooga local for 30 millwrights, and was informed that they were available and would report within the next few days (R. 100; J.A. 187–188). Later that day, Goodman learned that the strikers were still acceptable to the Company, with the exception of one apprentice (R. 110; J.A. 195). During the next few days, the Company reaffirmed this position at least twice (R. 101, 104–105; J.A. 32, 86–87). Nevertheless, on the morning of January 3, Goodman called the clerk at the Demopolis project gate, and told her that he had revoked all the referrals issued

to the former millwrights and that they should not be permitted to work (R. 100–101; J.A. 166–168). A substantial number of former millwrights appeared at the gate, were told of Goodman's revocation of their referrals, and were refused entrance (R. 101; J.A. 27–30, 70–72, 169). Meanwhile, Goodman continued to refer Chattanooga and Sheffield millwrights to the project (R. 105–106; J.A. 49–51).[5]

About January 3, at a time when the millwrights from Sheffield and Chattanooga were being given referrals and reporting for work, Goodman told a group of former millwrights that their referrals had been revoked because "you didn't go back to work when I told you to go to work," and that "they were not going back on that job while he was business agent as long as he could keep them off" (R. 101; J.A. 86). During the next few days, Goodman repeatedly said that he would not return the former millwrights to work because they had "crossed" him (R. 110; J.A. 141, 143).

Foreman Herman McGilberry was on vacation from December 21 until January 3 and was not involved in the walkout of December 28 (R. 102; J.A. 91–92, 95–96). On January 3, he went to the project and received permission from the superintendent to report to work the following day. As he was leaving, he heard Goodman tell a group of millwrights who were standing in the road that he was not going to let any of the former employees go back on the job. McGilberry spoke up and said that he had just talked

[5] The Company hired 41 "millwrights and apprentice millwrights" between January 2 and January 7. After that, it hired no more until January 31 (J.A. 205–211).

to the millwright superintendent and was told that he could return. Goodman replied, "I'm not going to let you go back to work, either" (R. 102; J.A. 92–95). When McGilberry reported the next day, the superintendent said that he could not put him back to work even though both he and the construction superintendent wanted him to go to work (R. 102; J.A. 92–95).[6]

On January 7, eight former millwrights signed their names to a telegram to the Brotherhood asking for an investigation as to why they were being kept off the job (R. 105; J.A. 74). At a union meeting on the night of January 8, Goodman read the telegram aloud and announced in substance that so far as he was concerned the men who had signed it would not get any more jobs in the area (R. 105; J.A. 75).

On these facts, the Board concluded that the master contract, as administered for the Demopolis project, created an illegal closed shop, because "a referral by Goodman was a prerequisite to hire" and "Goodman conditioned referrals upon matters connected with union membership or obligations" (R. 192–193, 116–117, 122–123). It also concluded that the eight millwrights named in the complaint, who had been working on the project in December 1957 and were thereafter denied further employment, had been discriminated against by Goodman because they had refused to comply with the union membership obligations imposed by him (R. 193, 116–117).

[6] McGilberry's termination slip stated on it, "Requested not to be put back to work by Mr. Goodman of Tuscaloosa Local" (R. 103; J.A. 52–57, 212–213).

The Board's order required petitioners to cease and desist from maintaining any arrangement or practice which conditions referral or employment upon union membership, and from causing or attempting to cause the Company or any other employer to discriminate against employees or applicants for employment in violation of Section 8(a)(3) of the Act (R. 198). The order also required petitioners and the Company, jointly and severally, to reimburse the eight named employees for any wage loss they may have suffered as a result of the discrimination against them, and to reimburse all millwrights and millwright apprentices who came from locals outside the jurisdiction of the District Council, and who worked at the Demopolis project, for "permit fees and/or dobies they paid in order to obtain employment" (R. 194, 189, 125–127).[7] The court of appeals enforced the Board's order in full (Pet. 2a–7a).

ARGUMENT

The issues which petitioners seek to raise are not presented. The decision of the court of appeals is correct, and it is entirely consistent with decisions of this Court and of other courts of appeals. Con-

[7] The findings and order summarized above are from the Board's supplemental decision and from those portions of its initial decision which it affirmed on reconsideration. As the Board noted (R. 189–192), the supplemental decision excised those portions of the initial decision which were predicated on principles rejected by this Court in *Local 60, Carpenters* v. *National Labor Relations Board*, 365 U.S. 651; *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667; and *National Labor Relations Board* v. *News Syndicate Co.*, 365 U.S. 695.

sequently, there is no occasion for further review by this Court.

1. In its supplemental decision the Board held that the practice followed by the Company and by petitioners in the execution of their collective bargaining agreement "established closed-shop conditions at the Demopolis project" (R. 192). This conclusion was based not on the bare fact that control over employment opportunities had been delegated to Goodman, the union's business agent, but on the particular standards used by Goodman in exercising this authority. The Board did not, in this case, strike down a hiring hall arrangement as unlawful *per se*; rather, it considered the actual operation of the arrangement in its entirety. Its conclusion that "Goodman conditioned referral upon matters connected with union membership or obligation" (R. 193) is supported by substantial evidence (see pp. 3–4, 6–7, *supra*)[8] and was properly sustained by the court of appeals. This Court's decisions in *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, and *National Labor Relations Board* v. *News Syndicate Co.*, 365 U.S. 695, do not—as petitioners contend (Pet. 14–17)—conflict with the Board's conclusion in this case since those decisions concerned only the question whether exclusive union hiring halls are illegal *per se*. Indeed, in *News Syndicate*, this Court observed that whether the actual operation of such an arrangement was to maintain and enforce

[8] Particularly to be noted in this connection is the fact that on at least two occasions non-union men were denied employment until they joined the Brotherhood (J.A. 125, 132).

closed-shop or preferential-hiring conditions "raises a distinct question." 365 U.S. at 700. It was that question which the Board decided here on a record showing actual discrimination in the operation of the referral system.

2. That discrimination was not based, as petitioners contend (Pet. 10–14), on the employees' refusal to honor a no-strike commitment or to refrain from wildcat activity. The Board found explicitly that the eight employees who were discriminatorily denied employment were not given referrals by Goodman "because they had 'crossed' him, because if he issued to them referrals it would embarrass him with other locals from whom he had ordered millwrights, because they had sent a telegram to the United Brotherhood asking in effect that Goodman be investigated, because he wanted to show them he was the 'boss'" (R. 116). These were all matters of internal union discipline, none of which could lawfully be used as a basis for denying employment to the allegedly offending members. See *National Labor Relations Board* v. *Local Union No. 85, Sheet Metal Workers' International Association,* 274 F. 2d 344 (C.A. 5), certiorari denied, 366 U.S. 908; *National Labor Relations Board* v. *Millwrights' Local 2232,* 277 F. 2d 217 (C.A. 5), certiorari denied, 366 U.S. 908.

Since the Board found that these were the grounds on which the eight employees were denied referrals, this case does not present the question whether it would be unlawful for the union to deny employment under a hiring hall arrangement for a reason which could permissibly be used by an employer to discharge

his employees. *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters,* 317 F. 2d 746 (C.A. 2), and *Miranda Fuel Co.,* 140 NLRB 181, are inapposite, for it is clear that even an employer acting alone could not discharge employees for the breaches of discipline upon which the union representative here based his denial of employment.

3. Finally, there is no merit to petitioners' contention (Pet. 17–22) that the Board's order, insofar as it requires the reimbursement of "permit fees and/or dobies" to millwrights who came from outside locals, is in conflict with *Local 60, United Brotherhood of Carpenters* v. *National Labor Relations Board,* 365 U.S. 651. Members of locals under the jurisdiction of petitioner District Council paid $4 a month dues. Members of outside locals, on the other hand, had to pay a $4-per-week permit fee if they wished to retain membership in their home local while working on the Demopolis project.[9] Since the members of the outside locals had to continue paying dues to their home local while paying the dobie to Local 1337, the Board could reasonably conclude that the dobie was paid by outside millwrights only because of the requirements of the illegal hiring arrangement. In these circumstances, a refund of the illegally exacted dobie payments was

[9] Petitioners challenge the correctness of the finding that the permit fee was $4 a week (Pet. 20, n. 10). However, this finding is based on the sole reference to the matter we have been able to find in the record (R. 123; J.A. 114). The other reference noted by petitioners (J.A. 118) concerns the amount of dues required for a man cleared from his home local into Local 1337 (see n. 4, p. 4, *supra*).

appropriate. See *Morrison-Knudsen Co.* v. *National Labor Relations Board,* 275 F. 2d 914, 917 (C.A. 2), certiorari denied, 366 U.S. 909;[10] *National Labor Relations Board* v. *Teamsters and Allied Workers, Hawaii Local 996,* 313 F. 2d 655, 659–661 (C.A. 9). This Court's decision in *Local 60, supra,* is not to the contrary. That case involved a refund order in which *all* dues for the period of the unfair labor practice were to be repaid to the employees. This Court concluded that it was impermissible for the Board to assume that the closed-shop agreement had coerced old-time union members into paying their dues. In the present case, on the other hand, the remedy granted by the Board is directed not at all dues (as, for example, those which the outside millwrights continue to pay to their home locals), but to the specific proceeds of the illegal hiring arrangement—the "permit fees" or "dobies." As to these payments, the refund order was permissible since they were "induced, obtained, or retained" (365 U.S. at 656) as a direct result of the unlawful practice.

[10] Although the Second Circuit denied enforcement of the Board's refund order in that case, it did so, insofar as the dobies were concerned, only on the ground that the Board had required the employer alone to make the reimbursement, and this was inequitable (275 F. 2d at 918). Here, on the other hand, the Board has followed its normal practice (see *National Labor Relations Board* v. *Puerto Rico Steamship Association,* 211 F. 2d 274 (C.A. 1)) of making the offending union and the employer jointly and severally liable for the refund.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 782

THE TUSCALOOSA AND VICINITY DISTRICT COUNCIL OF TUSCALOOSA AND SELMA, ALABAMA; AND CARPENTERS AND MILLWRIGHTS LOCAL UNION NO. 1337, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

I

The opposition to review of the refund question disregards the Board's actual basis of decision and substitutes for it "appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency it-

self. . . ." *Burlington Trust Lines, Inc.* v. *United States,* 371 U.S. 156, 168-169.

1. The Board's articulated basis of decision is that (a) this Court in *Local 60, Carpenters* "did not withhold from the Board the power to direct reimbursement of fees paid by *nonmembers* to obtain employment"; (b) a member of a home local union, working within the jurisdiction of a sister local union, is a nonmember; and (c) the Board may therefore require the refund of "permit fees and/or 'dobies' " paid by the member of the home local to the sister local (R. 194, emphasis supplied). The trouble with the Board's basis of decision is that it is in flat conflict with this Court's decision in *Local 60, Carpenters.* This Court did invalidate the compulsory refund of "nonmembership dues . . . and work permit fees" (365 U.S. at 652), the precise refund to so-called nonmembers ordered in this case. This Court did reject the Board's requirement, expressed throughout the administration of the refund remedy, of "reimbursement of all monies, including initiation fees, dues, *permit fees, 'dobies,'* and the like. . . ."[1] And the rejection came with respect to the refund of work permit fees paid pursuant to the constitutional authorization of the very international union, in the very situation of a member of a home local working within the jurisdiction of a sister local and paying fees to the latter, as is presented in this case. Adherence to *Local 60, Carpenters* requires summary reversal here.

2. Counsel's "*post hoc* rationalizations" are themselves but a veiled repudiation of *Local 60, Carpenters.*

[1] Petitioners' brief, p. 35, *Local 60 Carpenters* v. *N.L.R.B.*, 365 U.S. 651, quoting the statement of the then General Counsel of the Board.

(a) The opposition states that "In the present case ... the remedy granted by the Board is directed not at all dues (as, for example, those which the outside millwrights continue to pay to their home locals), but to the specific proceeds of the illegal hiring arrangement—the 'permit fees' or 'dobies' " (p. 12). But this is the exact situation that identically existed in *Local 60, Carpenters*. The order in *Local 60, Carpenters* did not direct the refund of the dues that the outside millwright paid to his home local. As to that outside millwright, the refund order was confined exclusively to the work permit fee that he paid to the sister local in whose jurisdiction he worked. The basis of the refund was said to be the coercion of the closed shop agreement as applied to the project in the jurisdiction of the sister local. It was the sister local, not the home local, that was a party to that agreement, and it was only monies paid to the sister local, not the home local, that were accordingly to be refunded.[2] The opposition thus does not distinguish between, but demonstrates the identity of, *Local 60, Carpenters* and the present case.

(b) The opposition states that, "Since the members of the outside locals had to continue paying dues to their home local while paying the dobie to Local 1337, the Board could reasonably conclude that the dobie was paid by outside millwrights only because of the requirements of the illegal hiring arrangement" (p. 11). But this argument was just as applicable in *Local 60, Carpenters*, and its lack of validity was established by this Court's rejection of the refund of "non-membership dues . . . and work permit fees." The argument is but a restatement of the Board's repudi-

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[2] Record, *Carpenters, Local 60*, No. 68, October Term, 1960, 7.

ated rationale that, but for the existence of a discriminatory hiring procedure, no worker would pay to a labor organization the monies required to maintain good standing in it. This generalization, rejected as incompatible with the history of trade unionism as an expression of "voluntary associations" (*Local 60 Carpenters,* 365 U.S. at 656), is especially inapt to the payment of a work permit fee. According to the opposition, except for the coercion of a closed shop arrangement, no member would pay a fee to the sister local and dues to the home local. Yet the payment of both is, under the ruling constitutional procedure of United Brotherhood, entirely the voluntary act of the member which he can avoid at his own pleasure. Under that procedure a member who leaves the jurisdiction of his home local to work elsewhere may, at his own option, either transfer his membership to the sister local union in the jurisdiction where the work is secured and thus pay dues to that sister local only, or he may retain his membership in his home local and obtain a working permit from the sister local in the jurisdiction of the work (Pet. for cert. pp. 18-20). When he chooses the latter, and thus chooses to pay dues to his home local and fees to the sister local, he is not acting under any constraint of any kind but is making his own independent choice which he is wholly free to make either way. Insofar as a closed shop requirement or an internal union requirement is concerned, either would be satisfied by a transfer of membership to the sister local. When a millwright, instead of transferring membership, chooses to retain his home local membership but work elsewhere, the double payment he incurs is his own voluntary act, and he can readily dispense with the double payment whenever he decides to transfer membership.

Contrary to the premise of the opposition, the double payment is therefore entirely voluntary. To presume constraint despite demonstrated voluntarism is glaring resurgence of the repudiated rationale—assumed coercion—which underlay the rejected refund remedy. And, were it the Board's business, which it is not, to question the validity as such of the payment of dues to a home local and a fee to a sister local, it would be enough to note that a person who lives in one State but works in another may be required to pay an income tax to both.

(c) Presumably to color its claim that the fees paid to the sister local were a constrained payment, the opposition asserts that the dues to the home local were $4 per month while the fee to the sister local was $4 per week (pp. 11, 4). In a letter dated February 18, 1965 written to this Court after the opposition was filed, the Government acknowledges that this statement is erroneous, and agrees that the fee to the sister local and the dues to the home local were each $4 per month. Any claim based on disparity is therefore out.[3]

3. It is a never-learned lesson that the Government's "interest . . . is not that it shall win a case, but that justice shall be done."[4] Summary reversal would give needed point to the lesson.

II

The petition presents for plenary consideration the question whether "a union commits an unfair labor

[3] We note, in any event, that disparity would be irrelevant. Whatever the amount or frequency of the fee, it is still a wholly voluntary payment which the member can dispense with whenever he pleases. The fee as such—its amount or frequency—is none of the Board's affair.

[4] *Berger* v. *United States*, 295 U.S. 78, 88.

practice when it denies referral to a job to employees for participating in a breach-of-contract and wildcat strike simply because the employer is indifferent to the unprotected character of the activity." The opposition does not deny that the question is important, that it has engendered a contrariety of opinion, and that it merits review. It urges instead that as a matter of fact "this case does not present the question. . ." (p. 10).

The Board's opposition in this Court is less forthright than its brief in the court below. In its brief below the Board stated flatly and correctly, as the central fact which the record unmistakably discloses, that "Business Agent Goodman's refusal to issue referrals to the 'old' men so they could return to work was obviously the result of his anger over their strike and their failure to terminate it when he had expected them to" (Pet. for cert. p. 10). The finding quoted in the opposition, said to be incompatible with this utterly clear statement, serves instead to confirm it fully. The finding reads that: "Goodman refused these 8-men referrals . . . because they had had referrals for January 2 but had not used them, because they had 'crossed' him, because if he issued to them referrals it would embarrass him with other locals from whom he had ordered millwrights, because they had sent a telegram to the United Brotherhood asking in effect that Goodman be investigated, because he wanted to show them he was the 'boss'" (R. 116, Opp. p. 10).

Every element of this finding confirms that the denial of referral was based on the strikers' participation in a breach-of-contract and wildcat work stoppage. Thus, (a) the striker's failure to use the referrals on January 2 was clearly a continuation of the strike by them and thus a rejection of the business agent's request

to end it. It is perhaps revealing that, in quoting the finding, the opposition omits this part of it. (b) The objection that the strikers had "crossed" him and that referral was denied to show them he was "boss" was the business agent's inelegant but unequivocal protest against the men's action in calling the strike without his authority and continuing it despite his order to return to work. Business agents do not happen to talk as fastidiously as some lawyers but are none the worse for it, and their actions are not illegal on that account. (c) The business agent's so-called embarrassment "with other locals from whom he had ordered millwrights" manifested the altogether nondiscriminatory attitude that, having arranged for replacements to come from Sheffield, Alabama, and Chattanooga, Tennessee, he was obliged to these men who were en route or had arrived from these distant places to give them the promised jobs for which they had come. (d) As the content of the telegram was a complaint by the strikers that the business agent was filling the jobs with "foreign" replacements (J.A. 153, 150), the business agent's objection to the telegram was simply reaffirmation of his opposition to the call and continuance of the strike in disregard of his authority as bargaining representative; in any event, denial of referral took place well before the telegram was sent, and could not therefore have been influenced by it.

Accordingly, as the Board informed the court below in its brief, the illegal strike was obviously the basis of the business agent's action. The opposition cannot fob this off as "all matters of internal union discipline ..." (p. 10). Whether an illegal strike is the lawful basis of denial of employment at the instance of a union no less than by the independent action of an employer is the question this case presents. The opposition should have faced rather than dodged it.

III

The opposition asserts that the finding of a discriminatory hiring procedure rests upon "a record showing actual discrimination in the operation of the referral system" rather than upon investiture of exclusive employment control in the union (p. 10). The assertion is in flat disregard of the explicit basis of decision by the Board and the court below. The Board did rely on "unfettered control" in the business agent and "referral" by him as "a prerequisite to hire at this project . . ." (R. 192). The court below did endorse that reliance by itself stating that the employer "hired exclusively through the hiring hall," granted the business agent "absolute control" over the selection of millwrights, and "refused, without any questions asked, to employ millwrights unless they could secure referrals" from the business agent (Pet. for cert. p. 7a). English has no meaning if this does not spell out reliance upon union control over hiring as the basis of illegality. And adjudication has no meaning if this basis of decision is not in complete conflict with *Local 357, Teamsters* and *News Syndicate*.

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